IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1569 of 2006
With
SPECIAL CIVIL APPLICATION No. 1570 of 2006
With
SPECIAL CIVIL APPLICATION No. 2000 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ADANI EXPORTS LTD. & 1 - Petitioner(s)
Versus
UNION OF INDIA THR' SECRETARY & 2 - Respondent(s)

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Appearance :
MR KAMAL B. TRIVEDI, Senior Advocate with MR RAKESH GUPTA, LD. ADVOCATE, MR. KM THAKOR, LD. ADVOCATE AND MR AM MEHTA FOR M/S TRIVEDI & GUPTA for Petitioner(s) : 1 - 2.
MR RM CHHAYA for Respondent(s) : 1,
MR JITENDRA MALKAN for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 05/04/2006

ORAL JUDGMENT

1. Rule. Learned advocate Mr. R.M. Chhaya waives service of notice of rule on behalf of respondent

no.1. Learned advocate Mr. J.M. Malkan, Assistant Solicitor General of India waives service of notice of rule on behalf of respondent no.2 and no.3.

2. The above Special Civil Applications have been preferred mainly against the order passed by the Appellate Tribunal for Foreign Exchange dated 4th January 2006 in Appeal No.199 of 2005, in Appeal No.500 of 2005 and in Appeal No.501 of 2005 whereby the application for pre-deposit of the amount of penalty in the respective appeals were dismissed (Annexure 'A' to the memo of petition).

3. Learned Senior Advocate Mr. Kamal Trivedi appeared on behalf of petitioner in Special Civil Application No.1569 of 2006 which is taken as a lead matter in the aforesaid group of petitions who has mainly submitted that on the basis of certain allegations for the breach of Customs Act, 1962 (hereinafter referred to as 'the Act, 1962'), the notices were issued to certain

parties including to the present petitioners mainly on the ground of certain mis-declaration as to the narration of the goods imported and for the ground of over invoices, so far as valuation is concerned and consequentially for the misuse of the foreign exchange. The goods were imported by M/s. Vaishal Impex. The goods were of the nature of Software, Compact Disks. The L/C was opened by the petitioner of Special Civil Application No.1569 of 2006 in the proceedings under the Customs Act, 1962. Several contentions were raised by the petitioner before the concerned officer under the Act, 1962. Thereafter, order-in-original was passed by the Commission of Customs and thereafter appeals were preferred by petitioners before the CESTAT, Bangalore. The Tribunal has waived deposit of the amount.

4. It is also submitted by learned Senior Counsel appearing for the petitioners that so far as notices issued under the Foreign Exchange Management Act, 1999)hereinafter referred to as

'the Act, 1999'), the issue involved is already subjudice under the Customs Act where there is any misuse of the foreign exchange or not. On the contrary, the notice issued under the Customs Act is so wider that it includes the narrow compass of the notice issued under the Act, 1999. Before CESTAT, Bangalore, appeals are already pending. Pre-deposit has also been waived in those appeals. Thus, there is a prima facie case in favour of the petitioner so far as case of the Customs Department is concerned. Thus, the allegations levelled against the petitioner under the Act, 1999, are already there in the notices under the Customs Act and therefore, the Authority under the Act, 1999 was requested to keep the proceedings in abeyance till the CESTAT, Bangalore decided finally the appeals. This request, though, is referred in the order passed at Annexure 'A' by the Appellate Authority and though there is a reference in the order passed by the Additional Director General, without paying any attention, to this argument, both he authorities have taken the decisions.

Without dealing with this argument, the matter was decided by the Additional Director General (Annexure 'F') ex-parte. The same point was raised even before the Appellate Authority and without appreciating this aspect of the matter, the waiver of pre-deposit application has been dismissed. Thus, there is an error apparent on the face on record. It is submitted by the learned Senior Advocate appearing for the petitioners that there is more than a prima facie case in favour of the petitioners. Learned Counsel for the petitioner has drawn my attention to an observation in the order passed by the Additional Director General, Mumbai (Annexure 'F') on Internal Page No.136 of the order which reads as under :

> **“Even though there is no direct evidence brought on record to prove the actual pricing of goods, the inference drawn on logical grounds as aforesaid lends credence to charge that the goods imported by M/s. Vaishal Impex comprising of 1,10,000 CD ROMs were heavily over**

invoiced.”

Thus, even the First Authority has admitted the fact that there was no direct evidence on record, but the inference has been drawn by the Additional Director General. In fact, the petitioner of Special Civil Application No.1569 of 2006 has opened a letter of credit, but the petitioner is not an importer. There is also an application for cross-examination of certain witnesses / officials of Directorate of Revenue Intelligence who were assisted with the investigated of the case. No such opportunity was given to the petitioner. Thus, one sided version or unilateral version of the officials of D.R.I. has been relieved upon which has led to make a presumption against the petitioner in absence of any direct evidence of misusing foreign exchange by the petitioner. It is also submitted by the learned Senior Advocate appearing for the petitioners that in fact, the order passed by the Additional Director General is an ex-parte order, in fact, the application was given on 16th

November 2004 for keeping the adjudication proceedings in abeyance and the predecessor of the officer who has passed the first order has, after hearing the matter, not passed the final order, but thereafter, there was a change in officer and newly appointed officer after giving only one date of hearing, passed the impugned order dated 4th May 2005 (Annexure 'F' to the memo of petition). In fact, the petitioners were heard by the Additional Director General long back. The application was given on 16th November 2004 and the order was passed on 4th May 2005. Thus, both the requests viz., to keep the proceedings in abeyance till the proceedings under the Customs Act, 1962, are finally adjudicated upon by CESTAT, Bangalore and the application for cross-examination of the officials who have investigated the case have not been dealt with by the Additional Director General. Thus, two applications have not been decided and the proceedings have been decided ex-parte. Against this order, appeals were preferred along with the dispensation of pre-deposit application. The same

points were reiterated before the Appellate Tribunal and also it was pointed out that the order passed by the Additional Director General was an ex-parte order and it was also pointed out that there are observations made by the Additional Director General are in favour of the petitioners. There is more than prima facie case in favour of the petitioners. There is also violation of principles of natural justice and also the plea was raised as to the jurisdiction on the basis of Section 49(3) of the Act, 1999, to the effect that the show cause notice issued under the Act, 1999 was received after two years of coming into effect of the Act, 1999.

5. Without considering all these submissions, the Appellate Tribunal has dismissed the applications for dispensation of pre-deposit vide order dated 4.1.2006. It is submitted by the learned Senior Advocate appearing for the petitioner that neither of the Authorities below have appreciated the fact that the notice issued under the Customs Act, 1962, takes in its sweep

all the allegations which are levelled in the show cause notice issued under the Act, 1999. The said notice and the Order-in-Original passed under the Act, 1962, is yet to be finally adjudicated upon by CESTAT, Bangalore. Without any condition of deposit, the appeals have been admitted by the CESTAT, Bangalore. This aspect of the matter has not been appreciated by both the authorities below. Moreover, opportunity of cross-examination of the witnesses have also not been allowed. The learned Senior Counsel appearing for the petitioners has relied upon mainly on the case decided by the Hon'ble Supreme Court in **2003 (154) E.L.T. 347 (SC)** and submitted that in that case, the order passed by the Tribunal was to deposit 30 lacs. The said order was challenged before the Hon'ble Supreme Court and it is observed by the Hon'ble Supreme Court as under :

“ Leave granted.

2. The issue here relates to the order passed by the Commissioner (Appeals), Central Excise

and Customs, under Section 35-F of the Central Excise Act, 1944. By the impugned order, the appellants have been directed to deposit an amount of Rs.30 lakhs by way of pre-deposit. The reasoning given in support of such other is wholly unsatisfactory. The appellant authority has not at all considered the prima facie merits and has concentrated upon the prima facie balance of convenience in the case. The Appellate Authority should have addressed its mind to the prima facie merits of the appellants' case and upon being satisfied of the same determined the quantum of deposit taking into consideration the financial hardship and other such relevant factors.

3. We accordingly set aside the decision of the High Court as well as the impugned order dated 14-8-2002 and remand the matter back to the appellate authority for redetermining the issue under Section 35-F of the Act after affording an opportunity of hearing to the parties.

4. The appeal is allowed without any order as to costs." (Emphasis supplied)

6. After observing as stated herein above, the

order was set aside of the pre-deposit and the matter was remanded for redetermination of the issue. In the facts of the present case also, it is stated by the learned Senior Advocate that prima facie case of petitioners has not been appreciated at all by the Appellate Authority nor even the violation of principles of natural justice have been appreciated. The learned counsel appearing for the petitioners has also relied upon the judgments delivered in **2005(187) ELT 300, 2006 (193) ELT 385 (Bombay), AIR 1976 SC 2095** and **AIR 1977 SC 747.** The learned Senior Advocate has also taken to this Court to several Clauses under the Foreign Exchange Regulations Act, 1973 and the provisions of the Foreign Exchange Management Act, 1999 and Section 49(3) of the Act, 1999, which he has labelled as "**Sunset Clause**" and the order passed by the CESTAT, Bangalore and the notice issued under the Customs Act, 1962 and submitted that impugned order passed by the Appellate Tribunal deserves to be quashed and set aside and also the order passed by the Additional Director General

deserves to be quashed and set aside as there is a breach of principles of natural justice and therefore, instead of remanding the matter to the Appellate Tribunal, the matter may be remanded to the lowest available authority i.e. Additional Director General.

7. I have heard the counsel appearing for the respondent No.1 who has submitted that as the matter is pending before the Appellate Authority, this Court may not interfere to find nicety of the facts and submitted that the order passed by the Tribunal at Annexure 'A' is true, correct, legal and in consonance with the facts of the case. The Tribunal after careful consideration of the facts has arrived at conclusion that there is no prima facie case in favour of the petitioners and therefore, the application for dispensation of pre-deposit has been correctly dismissed. He has also taken this Court to the facts of the present case and to the various Clauses of the provisions of the Act and pointed out that the waiver of pre-deposit is a discriminatory order

and the Court should not be interfered in such order under the power under Article 227 of the Constitution of India.

8. I have also heard the learned counsel appearing for respondent No.2 who has submitted that the order at Annexure 'A' as well as the order at Annexure 'F' to the memo of petitions are true and correct and submitted that so far as the waiver of pre-deposit is concerned, there is no legal right vested in the petition to get the waiver of pre-deposit by 100% in all the cases. It is also submitted by the learned counsel appearing for respondent No.2 that looking to the facts and circumstances of the case, the Tribunal has arrived at a conclusion that the petitioners ought to deposit 100% of the amount as ordered by the Additional Director General at Annexure 'F' and has also relied upon the judgment delivered by this Court (Coram : B.J. Shethna and Sharad D. Dave, J.J.) in **Sterlite Industries (India) Ltd. Vs. Union of India & Anr.** Reported in **2005(2) G.L.R. 1704** and the judgment delivered by the

Hon'ble Supreme Court in the case **Asst. Collector Vs. Dunlop India Ltd.** Reported in **1985 (19) E.L.T. 22 (SC)**. In view of these two judgments, the petitions may not be interfered by this Court.

9. I have heard the learned counsel for both the sides and looking to the facts and circumstances of the case, I hereby quash and set aside the order at Annexure 'A' as well as order at Annexure 'F' for the following facts and reasons:

(i) The notice has been issued under the Customs Act, 1962 which takes in its sweep not only the question as to the over-valuation and as to the breach of the provisions under the Customs Act and as to mis-declaration of the goods, but, has also some reference of the misuse of the foreign exchange. The misuse of the foreign exchange is a consequence of the mis-declaration and the over invoicing. If there is no mis-declaration and if there is no over invoicing the conclusion of misuse of the foreign exchange cannot be arrived

at, neither by the customs authority nor by the authority under the Foreign Exchange Management Act, 1999. The show cause notice under the Customs Act and the order passed thereupon, (which is known as order-in-original) is under challenge before the appellate Tribunal CESTAT, Bangalore. The appeals have been admitted and their applications for dispensation of pre-deposit has been allowed in favour of the petitioners. Thus, under the Customs Act, prima facie, it can be said that there is a case in favour of the petitioner. Pre-deposit has been waived by the order of CESTAT, Bangalore (Annexure 'E' to the memo of the petition). The order passed by the CESTAT, Bangalore is dated 8/12-10/2004.

(ii) Looking to the show cause notice issued under the Act, 1999, the whole show cause notice is based upon the investigation carried out under the Customs Act, 1962. The whole case under the Foreign Exchange Management Act, 1999 is nothing but the consequence of the mis-declaration of the

goods and over valuation under the Customs Act, 1962. The show cause notice under the Customs Act and the order passed thereupon are under challenge in Appeal before the CESTAT, Bangalore. Thus, the whole machinery under the Foreign Exchange Management Act, 1999 is looking towards the Customs Act, 1962. In the facts of the present case, the Authorities under the Act, 1999 is relying upon the investigation under the Customs Act and therefore, in all fairness, they ought to have waited till the out come of the Appeal pending before the CESTAT, Bangalore. The misuse of the foreign exchange is the only based for the issuance of notice under the Foreign Exchange Management Act, 1999, but, both the Authorities below, have lost sight of the fact that, the misuse of the foreign exchange depends upon the final adjudication of allegations viz., mis-declaration of the goods and over invoicing under the Customs Act, 1962. Unless and until, these allegations under the Customs Act, 1962 are finally adjudicated upon, against the petitioners, it cannot be concluded by the

authorities under Act, 1999 that there was misuse of the foreign exchange by the petitioners.

(iii)Though this point was raised before the Additional Director General by the petitioners to keep the proceedings in abeyance, there is not a whisper in the whole order passed by the Additional Director General (Annexure 'F'). The deciding authority cannot, turn deaf ear to, the important legal submission of the petitioners, which affects the very root of the case under the Act, 1999.

(iv) The petitioners have no other weapon in their hands except the cross-examination of the Officials of D.R.I. for finding out the truth. Cross-examination is a weapon in the hands of the petitioners. It appears from the facts of the present case that though application was preferred for cross-examination for Officials of D.R.I., who participated in investigation of the case,

Additional Director General who passed the first order (Annexure 'F' to the memo of the petition) has again not dealt with the said requests while passing the order. The specific requests of the petitioner for cross-examination, cannot be brushed aside for no reason. Looking to the facts of the case, the request of the petitioners cannot be labelled as unreasonable, especially, when the very same officer viz., Additional Director General has observed in his impugned order as under :

"Even though there is no direct evidence brought on record to prove the actual pricing of the goods the inference drawn on logical grounds as aforesaid lends credence to charge that the goods imported by M/s. Vaishal Impex comprising of 1,10,000 CD ROMs were certainly over invoiced".

Thus, when there is no direct evidence brought on record to prove the actual pricing of the goods, even after careful investigation of the case under the Customs

Act, the party is legitimately demanding the cross-examination of the Officials of D.R.I. At least the Additional Director General ought to have dealt with, the application for cross-examination, even for the refusal. But it appears from the facts of the case that the application for cross-examination has remained undecided which tantamount to breach of principles of natural justice. There is no provisions under any of the Acts either under the Customs Act, 1962 or under the Act, 1999, for the presumption of mis-declaration of goods, of over invoicing and of misuse of foreign exchange. All these facts are required to be proved. Mis-declaration of goods and over invoicing are alleged under the Customs Act, 1962. Appeals under the Act, 1962 are pending for their adjudication. Thus, it cannot be said that foreign exchange was misused unless and until proceedings under the Customs Act, 1962 are finally decided.

(v) Looking to the facts of the present case, it also appears that the date of hearing lastly fixed was 16.11.2004 by the Additional Director General, consistently the petitioners were requesting for keeping the present adjudication proceedings in abeyance or at least for giving cross-examination of the Officials of D.R.I., but without deciding any of these two points on 4th May 2005 i.e. after several months, the order Annexure 'F' was passed by the Additional Director General and therefore, Appeal was preferred along with waiver of pre-deposit application. Same two points were raised before Appellate Authority of keeping the matter in abeyance and cross-examination of the officers who participated in the investigation and additional points to the effect that the order at Annexure 'F' was ex-parte order and there was no jurisdiction with Additional Director General under the Act, 1999 to adjudicate upon the matter under Section 49(3) of the Act, 1999, which is labelled by

the Appellate Authority as '**Sunset Clause**'. It has been decided by the Hon'ble Supreme Court in **Mehsana District Co-Operative Milk P.U. Ltd. Vs. Union of India** reported in **2003(154) E.L.T. 347 (SC)** that while passing the order of pre-deposit, the Tribunal had not properly appreciated the prima facie merits and the impugned order was quashed and set aside an the matter was remanded to the Appellate Authority for redetermination of the issue under Section 35-F of the Central Excise Act, 1944. Looking to the provisions of Section 19 of the Act, 1999 and the provisions of Section 35-F of the Central Excise Act, 1944, they are at para-materia with each other. Looking to the facts of the present case, there is a prima facie case in favour of the petitioners, especially, when the adjudication under the Customs Act, 1962 is pending before the CESTAT, Bangalore and especially, when there is a clear finding on the part of the Additional Director General as stated herein above as to no direct

evidence brought on record to prove the actual pricing of the goods. The inference has been drawn on logical grounds by the Additional Director General and that too, without giving cross-examination of the Officials of D.R.I. Though both the Authorities below have observed that there was such demand of cross-examination, but, neither of the Authorities have dealt with as to grant or rejection of the said application. It is rightly submitted by the learned counsel appearing for the petitioner that two vices incorporated at the initial stage cannot be cured at subsequent stages. Reliance is placed upon the case decided by the Hon'ble Supreme Court in **1976 SC 2095 (Paras 18 & 22), AIR 1977 SC 747 (Para 14)** and a case decided by the High Court of Judicature at Bombay in **2006 (193) E.L.T. 385 (Paras 45 to 49)**.

10. As a cumulative effect of the aforesaid

facts, reasons and judicial pronouncements, I hereby quash and set aside the order passed at Annexure 'A' as well as the order at Annexure 'F' and I hereby remand the matter for fresh decision in accordance with law and in light of aforesaid observations, by Additional Director General, Office of the Directorate General of Service Tax, Mumbai i.e. Respondent No.3 herein or any successor in office of the respondents. Rule is made absolute to the aforesaid extent.

[**D.N. PATEL, J.**]

#Dave